Supreme Court, U.S.
FILED
DEC 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-535

In the Supreme Court of the United States

OCTOBER TERM, 1990

JUWHAN YUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's undercover investigation of petitioner's involvement in illegal munitions-export plans violated the Due Process Clause.

2. Whether the evidence established the defense of entrapment as a matter of law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-5a) is unreported. The opinion of the district court (Pet. App. 6a-33a) is reported at 718 F. Supp. 366.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1990, and a petition for rehearing was denied on April 27, 1990. Pet. App. 2a-3a. On July 12, 1990, Justice Brennan extended the time within which to file a petition for a writ of certiorari to September 24, 1990, and the petition was filed on

that date. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to export nerve gas (Sarin) without a license, in violation of 18 U.S.C. 371, 22 U.S.C. 2778(b)(2), and 22 C.F.R. 127.1.* He was sentenced to 30 months' imprisonment and three years' supervised release. The court of appeals affirmed. Pet. App. 4a-5a.

1. The evidence at trial showed that in June 1988, petitioner, the president of Komex International, telephoned William E. DeArman, the project director at CIC International, a company involved with the defense industry and international trade. Petitioner requested a quotation on "ammunitions," specifically 105 and 106 millimeter ammunition. He followed up his telephone inquiry with a telefax reciting his requirements and stating that the end-user of the munitions would be the Republic of Korea. For a number of reasons, however, DeArman, a former United States Customs Agent, was suspicious of the inquiry. First, members of the defense industry were normally fluent in the pertinent arms nomenclature and would not have used the term "ammunitions." Second, 105 millimeter ammunition was not of a type commonly requested by a government. Third, there were several manufacturers located in Korea that could have supplied that type of material. Fourth, CIC International did not normally receive domestic

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* Petitioner was acquitted on another count charging attempted exportation of nerve gas without a license. Gov't C.A. Br. 3.

requests for such material; rather, most inquiries came from its own agents or directly from foreign governments. Gov't C.A. Br. 5-6; see also C.A. App. 1.63-1.70, 1.78-1.80.

DeArman notified the United States Customs Service, which commenced an undercover operation. C.A. App. 1.67-1.68. Customs Agent Richard Kennan telephoned petitioner and introduced himself as Richard Moyes, the president of T & C Trading, which Kennan said was an export arm of CIC International. During the ensuing six months, petitioner and Kennan continued negotiations about the ammunition. Persons in the business of exporting defense articles must register with the Office of Munitions Control, and petitioner's company, Komex International, was registered with that Office during this time. Gov't C.A. Br. 6-7.

In July 1988, Kennan and petitioner met and discussed "silkworm" and TOW-2 missiles. Kennan claimed that he could obtain those items. Petitioner immediately mentioned Iran, and told Kennan that four years earlier he had made inquiries concerning TOW missiles on behalf of South Korea, which was interested in obtaining 400 missiles for Iran. Petitioner recounted that this activity had prompted a visit from the FBI, but that he had told the FBI that the missiles were for Korea. At a later meeting in August 1988, petitioner confirmed that the actual destination of the TOW missiles was Iran. Gov't C.A. Br. 9-10.

Later in August 1988, petitioner again contacted Agent Kennan. Petitioner stated that a customer needed 1250 missiles, but he expressed concern about the "illegality" of the order because the missiles were on the United States' Munitions List and therefore required an export license from the Office of Muni-

tions Control. An export license identifies, *inter alia*, the purpose for which the commodity is to be exported and the foreign "end-user." See Gov't C.A. Br. 7, 10. Petitioner suggested that he could obtain a phony end-user certificate, and Agent Kennan indicated that he could obtain a phony export license, which he said would cost either 1% of the total price or $50,000, whichever was less. Petitioner said that the $50,000 presented no problem. Kennan emphasized to petitioner that the license would not be legal, because it would be based on a phony end-user and because the arms would actually be going to Iran. Petitioner stated that the purchaser would use a third country that was friendly to the United States as the purported final destination. Petitioner eventually told Agent Kennan that he had made up his mind to go through with the TOW missile deal, and he later inquired about the availability of other products to sell to Iran, including stinger missiles and Varian tubes. *Id.* at 10-11.

In November 1988, Charles Caplan, of Domino Associates Holding Ltd. in London, asked whether petitioner could provide 500 units of the nerve gas Sarin for shipment to Iran. Petitioner promised to check. Having intercepted these communications, Agent Kennan told petitioner the next day that he had received a massive order for many items desired by Iran, including "chemical stuff like Sarin." C.A. Supp. App. 41; C.A. App. 2.22-2.23. Two days later, petitioner telefaxed a message to Caplan, stating that petitioner was scheduled to have dinner with "a business gentleman for your 500 ea." C.A. Supp. App. 46, 47; C.A. App. 2.26; Gov't C.A. Br. 11-13.

Shortly thereafter, petitioner met Agent Kennan for lunch. After discussing other matters, including

the ammunition, petitioner raised the subject of the Sarin. Kennan furnished petitioner information concerning available containers and prices. Petitioner suggested using a code name for the chemical in discussions and telefaxes. Shortly after lunch, petitioner informed Caplan by telefax that the product could be shipped within a month, and he asked Caplan to specify the desired container size. In December 1988, after additional contacts with Caplan, petitioner asked Kennan to procure 500 units of Sarin in a specified container. Kennan stated that he would need a 10% down payment in advance, which would include the cost of the phony export license. Petitioner also discussed financial arrangements for the deal that would yield him a profit of $2000 per unit, for a total of $1 million. Gov't C.A. Br. 13-15.

After petitioner had further conversations with Caplan and Kennan, petitioner and Kennan discussed the Sarin deal at length at a meeting on January 11, 1989. Kennan assured petitioner that he would procure an export license, but again he stated that the license would be "bogus." Petitioner suggested that the license identify the goods as "crankshafts," but Kennan pointed out that this subterfuge would not survive a cursory inspection and suggested that the license specify regular Mark 82 bombs. Toward the end of the meeting, the two men quarreled concerning the financial arrangements and shipping date. Petitioner told Kennan that his contacts in London were skeptical about Kennan because petitioner had not previously dealt with him. Petitioner wanted to complete the munitions deal first and delay the Sarin deal. Kennan did not want to proceed with the munitions deal because although the items were available, the financial arrangements for it would have placed

the Customs Service at risk of financial loss, and Kennan wanted to complete the Sarin investigation. Kennan accordingly told petitioner that, for cash-flow reasons, the Sarin deal had to be completed before the munitions deal. Petitioner, who did not want the two matters connected, insisted that petitioner first demonstrate his capability through the munitions deal. Gov't C.A. Br. 17-18.

Unable to resolve the matter, the two men parted. Within about an hour, however, petitioner telephoned Kennan twice and left a message for Kennan to call him. When Kennan returned the call, petitioner explained that he was doing what he could, that the timing of the Sarin deal was beyond his control, and that the earliest shipping date would be early February. Kennan asked for time to think about it, and he called petitioner again later that evening. They discussed both the Sarin deal and the munitions deal, as well as the possible shipment of anti-aircraft missiles, for which petitioner suggested getting a phony export license to permit quick shipment. Petitioner reassured Kennan that if he was patient, they would eventually make a lot of money. The two men agreed to talk the next day. On January 12, 1989, petitioner was arrested in Kennan's office. Gov't C.A. Br. 18-19.

2. The district court rejected petitioner's argument that the undercover operation established entrapment as a matter of law and violated the Due Process Clause. Pet. App. 6a-33a. Petitioner's contention that he was entrapped as a matter of law rested principally on the notion that he had withdrawn from the conspiracy at the January 11, 1989, meeting. *Id.* at 7a, 21a-22a. The court rejected this contention, observing that what transpired during the meeting and the "blow-up" between the two men, as well as petitioner's prior and subsequent actions,

were "hotly disputed by the parties and [were] for the jury to evaluate," *id.* at 21a, and "the jury found that [petitioner] was predisposed, and thus not entrapped." *Id.* at 7a. "Viewing the evidence in a light most favorable to the government," the court found "no basis to disturb the jury's determination that [petitioner] was not entrapped and did not withdraw from the conspiracy." *Id.* at 22a.

The district court likewise concluded, based on this Court's decisions in *United States* v. *Russell*, 411 U.S. 423 (1973), and *Hampton* v. *United States*, 425 U.S. 484 (1976), and an elaborate review of Third Circuit precedents, that petitioner did not have a viable due process claim. Pet. App. 18a-19a; see *id.* at 9a-21a. The court could not "find that the investigation was launched for an improper reason," in view of the suspicious nature of petitioner's initial inquiry to an official of CIC International. *Id.* at 19a. The court further observed that "[n]o authority now exists which would permit this court to find that the mere initiation of the investigation violated [petitioner's] due proces rights." *Id.* at 7a. Finally, the court concluded that because the government had offered sufficient evidence to support the jury's finding that petitioner "was an active participant in a plan to export Sarin without a legitimate license," this was not a case in which "the plan was completely initiated and operated by the government." *Id.* at 20a-21a.

3. The court of appeals summarily affirmed petitioner's conviction in an unpublished order, rejecting petitioner's entrapment and due process claims. Pet. App. 4a-5a.

ARGUMENT

1. Petitioner first contends (Pet. 7-14) that a government undercover investigation violates the Due Process Clause if the government does not have a "reasonable suspicion" for targeting the subject. This case, however, does not present that issue, since the record shows that the government had ample grounds for initiating an investigation of petitioner.

When petitioner telephoned DeArman at CIC International, DeArman, a former Customs agent, was justifiably suspicious of petitioner's intentions for a number of reasons. First, petitioner, unlike most members of the defense industry, was not conversant with the pertinent nomenclature. Second, petitioner was requesting, ostensibly on behalf of the Republic of Korea, a type of anti-personnel ammunition that was not normally requested by governments. Third, the Republic of Korea would have been able to obtain those munitions from its own manufacturers. Fourth, CIC International did not normally receive domestic inquiries for that type of munitions. Only when presented with this information did the Customs Service contact petitioner and explore his munitions activities. See C.A. App. 1.63-1.70, 1.78-1.80. Against this background, the district court properly concluded that the investigation was not launched without any predicate or for an improper reason. Pet. App. 19a. The course of the investigation of petitioner, culminating in the conspiracy for illegal exportation of Sarin, confirmed that the government's initial suspicion was well founded.

In any event, the courts of appeals have repeatedly rejected the due process contention petitioner advances here. As the Seventh Circuit recently concluded, "[t]he Constitution does not require the gov-

ernment to have a preexisting good faith basis for suspecting criminal activity before initiating an undercover investigation." *United States* v. *Miller*, 891 F.2d 1265, 1269 (1989); accord *United States* v. *Jacobson*, 916 F.2d 467, 469 (8th Cir. 1990) (en banc); *United States* v. *Jenrette*, 744 F.2d 817, 824 & n.13 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099 (1985); *United States* v. *Jannotti*, 673 F.2d 578, 609 (3d Cir. 1981) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States* v. *Myers*, 635 F.2d 932, 940-941 (2d Cir.), cert. denied, 449 U.S. 956 (1980). Due process limitations "come into play only when the Government activity in question violates some protected right of the *defendant*." *Hampton* v. *United States*, 425 U.S. 484, 490 (1976) (plurality opinion). Yet, as the Eighth Circuit has succinctly noted, a defendant has "no constitutional right to be free of investigation." *United States* v. *Jacobson*, 916 F.2d at 469. In other words, where "the conduct of the investigation itself does not offend due process, the mere fact that the investigation may have been commenced without probable cause does not bar the conviction of those who rise to its bait." *United States* v. *Driscoll*, 852 F.2d 84, 87 (3d Cir. 1988) (internal quotation marks and citation omitted).

Petitioner mistakenly relies (Pet. 8-14) on *United States* v. *Jacobson*, 893 F.2d 999 (8th Cir. 1990), and *United States* v. *Luttrell*, 889 F.2d 806 (9th Cir. 1989). The Eighth Circuit, sitting en banc, has reversed the panel's ruling in *Jacobson*, and thus "join[ed] with the courts of appeals that hold the constitution does not require reasonable suspicion of wrongdoing before the government can begin an undercover investigation." 916 F.2d at 469. And the Ninth Circuit has recently ordered that *Luttrell* be reheard by the court en banc. *United States* v. *Lut-*

trell, 906 F.2d 1384 (1990). Accordingly, even if this case presented the question whether the government must have some measure of suspicion before targeting an individual for an undercover investigation, review of that question would be premature in this case because of the absence of any conflict among the courts of appeals.

2. Petitioner also argues (Pet. 14-19) that he was entrapped as a matter of law because the evidence failed to show that he had the requisite predisposition to commit the crime. This argument is completely without merit. As the evidence showed, petitioner had already sent military equipment (parts for the 20 millimeter "Vulcan" automatic weapon) to South Korea without a license between June 1986 and December 1988. C.A. Supp. App. 307-348. Although those parts were on the United States Munitions List, petitioner never obtained export licenses for the shipments. To be sure, petitioner testified that his conduct over that 18-month period was merely a mistake, but the jury was entitled to conclude otherwise, especially given petitioner's substantial experience in the munitions industry. Gov't C.A. Br. 24-25.

Moreover, petitioner admitted to Agent Kennan that he had helped South Korea circumvent Swedish laws prohibiting exportation of weapons from Sweden to a "conflict country." Although petitioner claimed that his conduct was appropriate because the Swedish Government actually wanted its laws to be violated, the jury was entitled to reject that explanation and to find that petitioner was predisposed to engage in illegal exportation. Gov't C.A. Br. 25. Furthermore, petitioner admitted to Kennan that he had investigated the procurement of 400 TOW missiles for Korea to send to Iran. C.A. Supp. App. 284-285. Because such an exportation would have vio-

lated the Arms Export Control Act, petitioner told Hughes Aircraft and the FBI that the end-user was Korea, thereby demonstrating his readiness to conspire to violate the Arms Export Control Act. C.A. Gov't Br. 26.

In addition, well before the negotiations concerning Sarin began in November 1988, petitioner enthusiastically embraced Kennan's proposal to obtain TOW missiles, and petitioner pursued a plan to obtain shipment of the missiles, with the ultimate destination of Iran. Petitioner first mentioned Iran; petitioner told Kennan that the ultimate destination would be Iran; petitioner suggested that he could obtain a phony end-user certificate; and he proposed code words to use in discussing the illegal transactions. In sum, the record refutes any suggestion that petitioner was entrapped as a matter of law. The district court therefore correctly permitted the jury to pass on his entrapment defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1990

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